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No. 96-1577

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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2488

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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I. THE VILLAGE'S AUTHORITY TO IMPOSE THE TAX AT ISSUE TURNS ON WHETHER THE LAND IS INDIAN COUNTRY.

Respondents begin by urging the Court to avoid the principal question presented altogether, briefly suggesting that the judgment below may be sustained on the ground that the Village may tax non-members whether or not the land is Indian country. *See* Resp. Br. 21-22. There are several problems with this tack, beginning with the fact that this argument was never raised or passed upon below. Quite the contrary, respondents have explicitly argued throughout this litigation that the Village's authority to tax non-members turns on whether the land is "Indian country,"[1] which is the precise issue that both

[1] *See* Br. for Native Village of Venetie Tribal Gov't, *et al.*, p. 13 (9th Cir.), quoted at Pet. Br. 18 n.19; Post-Trial Br. for Native

the District Court (Pet. App. 39a) and the Ninth Circuit (*id.* 6a) addressed and decided below. This new argument accordingly cannot be relied upon in defending the Ninth Circuit judgment. *See United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989); *Heckler* v. *Campbell*, 461 U.S. 458, 468 (1983).

In any event, respondents' new argument is unavailing. While this Court has said that an Indian tribe's "power to exclude non-Indians from Indian lands" may provide "a basis for tribal authority to tax," *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), it has done so *only* in cases in which the underlying land was indisputably Indian country. Thus, for example, in both *Merrion*, 455 U.S. at 133-134, and *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195, 197 (1985)—the cases relied upon by respondents—the tribal taxes at issue applied to activities on Indian reservations, the prototypical example of Indian country.[2] We are aware of no case from this or any other court—and respondents have cited none—upholding a tribal tax on non-members outside Indian country. Instead, courts have held that "[i]n order to determine whether * * * Tribes have jurisdiction [to tax] we must * * * look to whether the land in question is Indian country." *Mustang Prod. Co.* v. *Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996), *cert.*

Village of Venetie IRA Council, p. 1 (District Court) (question presented is "whether the Native Village of Venetie is Indian country as defined in 18 U.S.C. § 1151(b)").

[2] *Merrion*, for example, involved the taxing power of "Indian tribes *within 'Indian country,'*" and considered "the Tribe's authority to tax non-Indians who conduct business *on the reservation*." 455 U.S. at 140-141 (internal quotation marks and citations omitted; emphases added). This principle works in the other direction, too. Thus, the Court has made clear that the rule that Indian tribes are generally immune from state taxation "does not operate outside Indian country." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 464 (1995).

denied, 117 S. Ct. 1288 (1997); *see* Pet. App. 137a (same).

That is particularly true here, because the tax at issue is confined by its express terms to "Indian country." *Native Village of Venetie Tax Code* § 146 (Pl. Ex. 141). In addition, to the extent that the Village now seeks to ground its authority to tax on the ability to exclude nonmembers from the land, it is far from clear that this authority may be invoked to exclude and therefore impose a tax on agents of the State, especially when, as here, they have entered the land to improve public facilities that the State is indisputably entitled to "occupy and use." Resp. Br. 5-6 n.4.[3]

Accordingly, as articulated by the courts below (Pet. App. 6a, 39a), explained by petitioner (Br. i, 18), and reflected in respondents' own formulation of the question presented, the dispositive issue in this case is whether "the Native Village of Venetie * * * occupies Indian country." Opp. Cert. i; Resp. Br. i.

II. THE EXISTENCE OF INDIAN COUNTRY DEPENDS ON THE INTENT OF CONGRESS, WHICH CLEARLY FORECLOSES THE VILLAGE'S CLAIM.

1. When it comes to addressing that question, respondents' basic refrain seems to be that Venetie is Indian country because, in their view, the land has the look and feel of it. Thus, respondents paint a romantic picture of the "Neets'aii Gwich'in Indians" and their "homeland," attempting to lull the Court with the "migratory rhythms of caribou and salmon" passing Venetie's way. Resp. Br.

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[3] As respondents acknowledge (Br. 5-6 n.5), the Village has given the Yukon Flats School District—a creature of state law—a 55-year lease "to occupy and use * * * school sites and related facilities in [Venetie]." The School District operates schools in Venetie and the surrounding region in fulfillment of the State's obligation to "establish and maintain a system of public schools open to all children of the State." Alaska Const. art. 7, § 1.

1. All can agree that the residents of the Village of Venetie—like those of hundreds of other Native, non-Native, and mixed communities in rural Alaska—occupy a rustic land that, despite the presence of modern conveniences such as electricity, motorized vehicles, and satellite dishes, still retains a frontier air. "Indian country," however, is a jurisdictional, not a descriptive concept.

While respondents (Br. 2, 20) seek to downplay the obvious jurisdictional consequences of holding that the 226 Alaska Native villages (including Venetie) occupying millions of acres of ANCSA land constitute—or may constitute, subject to the vagaries of a multi-part balancing test—Indian country, it is indisputable that this determination directly affects the civil and regulatory jurisdiction of the State over this land. *See* Pet. Br. 18 & n.9; Br. for California *et al.* 6-12. As the Department of the Interior put it, "[i]n both legal and practical effect, classifying [ANCSA] lands as Indian country would create huge jurisdictional enclaves, presumptively outside the reach of state jurisdiction." DOI Op., p. 118. Even respondents, who first claim this case is only about taxes, eventually acknowledge that it concerns the "authority to govern the land," Br. 43—a power ordinarily vested in the State, not private landowners.

It is for this reason that the Indian country inquiry turns on *congressional intent* to designate land as Indian country—and thus displace normal state jurisdiction over the land—not on some amorphous judicial determination that a particular tract of land has a "uniquely Indian character," or is a "distinctly Indian community." Resp. Br. 22, 25. *See* Law Profs. Br. 3 (Venetie is Indian country because it is "as 'Indian' a place as one can imagine").[4] What is "distinctly Indian" to one person

[4] In *United States* v. *Pelican*, 232 U.S. 442, 449 (1914), this Court adverted to the fact that the land in question had "a distinctly Indian character." This was not, however, because of the Court's subjective impression of the community; rather, it was because, as the Court continued, the land was "devoted to Indian occupancy *under the limitations imposed by Federal legislation.*" *Id.* (emphasis added). Congressional action to assume federal responsibility and displace the normal reach of state law—not the result of some judicial Rorschach test—was determinative.

may not be to another; indeed, the history of Alaska Natives is entirely different from that of the Indians in the lower 48 States, creating confusion for most of Alaska's history as to whether Native villages in Alaska are even "Indian tribes." *See* Pet. Br. 3-10; *infra* at 12.[5]

The threshold jurisdictional determination whether Venetie is Indian country should not be left to the vagaries of such a subjective and free-wheeling test. *See* Pet. 29. Rather, this Court should adhere to the approach carved by existing precedent, and embraced even by the principal secondary authority upon which respondents and their amici rely (Cohen), and look to the intent of Congress. *See* Pet. Br. 18-19. As we explained in our opening brief, that intent—which Congress made surpassingly clear in ANCSA—forecloses any judicial determination that Venetie, or any of the other lands conveyed

[5] The difficulties inherent in untethering the Indian country inquiry from congressional intent are underscored by the widely varying formulations offered by respondents' amici as *the* definitive "dependent Indian community" test. *See, e.g.*, TCC Br. 8 n.5 ("It is sufficient that a 'dependent Indian community' use or occupy land *as a community* in order for that land to be Indian country.") (emphasis in original); AFN Br. 2 ("villages [are Indian country if they are] occupied almost exclusively by Natives, governed in the traditional way, and dependent upon the resources of their territory for their existence"); *id.* 19 n.25 (listing six different factors that "in toto" are "relevant" to the analysis); Law Profs. Br. 11 ("As long as the indicia of dependence exist and Native people continue to reside together in a reasonably distinct location recognized as their residence by the federal government, they should be considered 'dependent Indian communities.'") (internal quotation marks omitted).

as part of the Alaska Native claims settlement, is Indian country.[6]

2. ANCSA presents two immediate and insurmountable problems for respondents' theory of the case. In arguing that Venetie is (and always has been) Indian country, respondents repeatedly state that the land is their aboriginal "homeland," *e.g.*, Br. 1, 19, 33, 37, 50, apparently seeking to invoke "the rule of *Bates* v. *Clark*, 95 U.S. 204, 208 (1877)." Resp. Br. 33. Under *Bates* —which was superseded in 1948 by the federal Indian country statute—the existence of Indian country turned on whether Indian-occupied land was aboriginal. *See* 95 U.S. at 208-209. Even under this rule, however, when aboriginal title is extinguished, the land "cease[s] to be Indian country." *Id.* at 208. In ANCSA, Congress not only expressly extinguished all aboriginal title to Native-occupied lands in Alaska (including Venetie), 43 U.S.C. § 1603(b), it extinguished "[a]ll claims * * * *based on* claims of aboriginal right, title, use, or occupancy of land." *Id.* § 1603(c) (emphasis added). *See* Pet. Br. 33 n.23.[7]

In arguing that Venetie is Indian country, respondents also rely heavily on the fact that the land *used* to be a

[6] In their effort to side-step ANCSA, respondents assert that "in every case where the area in question has been the home of a federally recognized tribe, Indian country has been found." Resp. Br. 32 n.28. That is not true and, even if it were, would not permit this Court to disregard the intent of Congress in ANCSA. The area within the Rosebud Sioux Reservation, for example, was home to some 2000 Rosebud Sioux, but that did not prevent this Court from giving effect to Congress' intent to disestablish the reserve and, thus, eliminate the land's Indian country status. *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 613-614 & n.47 (1977).

[7] Respondents refer to the Venetie tract as "unceded." Resp. Br. 33, 38, 41, 42. But the land patented to ANCSA corporations pursuant to ANCSA—including the Venetie tract—was clearly "ceded": aboriginal title to the land was expressly extinguished by Congress, 43 U.S.C. § 1603, and the land was expressly designated as "public." *Id.* § 1610.

reservation. *E.g.*, Br. i, 3, 5, 20, 33, 38, 40-41. In ANCSA, Congress expressly revoked the few existing reserves that had been created in Alaska (save Metlakatla). 43 U.S.C. § 1618(a). The Village continues to suggest that this revocation was a "technical[ity]," Resp. Br. 20, 40, but it was nothing of the sort. Under well-established law, one of the principal consequences of a congressional decision to revoke a reservation is that the land "within the historical boundaries of the [former] reservation, is not 'Indian country.'" *Hagen* v. *Utah*, 510 U.S. 399, 401 (1994). *See* Pet. Br. 32.

That is the end of the matter. This Court has never undertaken a second-tier inquiry to see if the land nevertheless retains its Indian country status because it has—as, presumably, would *all* newly revoked reserves—"a uniquely Indian character." Resp. Br. 22. It did not do so in *Hagen*, in *Rosebud Sioux Tribe*, or in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975); instead, in each of these cases, the Court, having determined that Congress revoked the land's reservation status, concluded that the land was not Indian country and that, as a result, normal state jurisdiction applied. This makes perfect sense. Permitting Indian country status to survive the disestablishment of a reservation would eliminate the most significant jurisdictional consequence of revoking the reservation, a fact that plainly was not lost upon the ANCSA Congress. *See* Pet. Br. 28-30, 36 n.25.

In any event, there is nothing "technical" (Resp. Br. 20) about ANCSA's revocation of the few reservations that had been created in Alaska. As respondents themselves acknowledge, the ANCSA Congress was "'vehemently antireservation'" and "sought 'to avoid perpetuating in Alaska the reservation and trustee system.'" Resp. Br. 44 n.43 (quoting legislative record). *See* Pet. Br. 28-30. ANCSA's express purposes, 43 U.S.C. § 1601(b), and its provisions extinguishing aboriginal title, *id.* § 1603(b), stripping the land of pre-existing federal controls, *id.* §§ 1603(b)-(c), 1606, 1607(a), 1613(g),

1617, 1618(a), and making the land a freely alienable corporate asset subject to state (not federal) law, *id.* §§ 1606(d), 1607, are all a testament to that clear intent.[8] Judicial designation of ANCSA land as Indian country within Section 1151(b), and thus the functional equivalent of a reservation, would—in gross disregard of that intent—have the effect of establishing the largest single reservation system in the history of this country.

III. NEITHER VENETIE NOR ANY OF THE OTHER SETTLEMENT LANDS QUALIFIES AS A "DEPENDENT INDIAN COMMUNITY" UNDER SECTION 1151(b).

1. As we have explained, the dependent Indian community category of Section 1151 is a narrow adjunct to the more typical types of Indian country that surround it in the statutory listing, created by Congress to extend Indian country status to land that Congress has clearly dedicated for Indian use and occupancy as the equivalent of a reservation. *See* Pet. Br. 19-25. This Court's precedents—especially *United States* v. *Sandoval*, 231 U.S. 28 (1913) and *United States* v. *McGowan*, 302 U.S. 535 (1938)—compel this construction. *See* Pet. Br. 20-22.[9] While respondents would reject it out of hand, this construction hardly breaks new ground. It has been embraced not only by the federal agency charged with overseeing Indian affairs, DOI Op., pp. 114-115, but by Cohen, *see* Pet. Br. 23, and the lower courts, too. *See, e.g., Blatchford* v. *Gonzales*, 670 P.2d 944, 946 (N.M. 1983) ("Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely overlap."), *cert. denied*, 464 U.S. 1033 (1984).

[8] Respondents seem to suggest that Congress was required to go still further and expressly negate their precise position in this case. This Court, however, has "never required [that Congress use] any particular form of words" in eliminating Indian territorial jurisdiction. *Hagen*, 510 U.S. at 411.

[9] Respondents object that the Pueblo Indians in *Sandoval* held "fee simple title" (231 U.S. at 48) to the land. But while the land in *Sandoval* was held in communal fee, it remained—pursuant to the explicit direction of Congress—"under the absolute jurisdiction and control of the Congress of the United States." *Id.* 37 n.1. *See* Pet. Br. 21 n.12. The land in this case emphatically is *not* subject to any such federal control, and thus is completely unlike the land in *Sandoval*. See Pet. Br. 9-10, 37. Yet such control—whether reflected in the title to the land or, as in *Sandoval*, in specific legislation—is key to Indian country status.

2. In fact, it is respondents, not the State, who ask this Court to break new ground. In framing the inquiry under Section 1151(b), respondents claim that the dispositive question is whether the Indians occupying the land are a federally recognized tribe and, thus, dependent on the federal government for their "political" existence; if they are, say respondents, then the land they occupy is automatically a dependent Indian community within Section 1151(b), regardless of whether the federal government has asserted any particular form of superintendence or control over the land. *See* Resp. Br. 23-26.[10]

This argument is defeated at the outset by the very federal recognition in which respondents now ground their Indian country claim. The list of federally recognized tribes in Alaska—which includes the Village of Venetie—expressly states that "[i]nclusion on the list *does not resolve the scope of powers of any particular tribe over land or non-members.*" 60 Fed. Reg. 9250, 9251 (Feb. 16, 1995) (emphasis added; footnote omitted). If that were not clear enough, the quoted passage is immedi-

[10] As a consequence of this approach, respondents and their amici suggest that, in arguing that ANCSA land is not Indian country, the State somehow disputes the tribal status of the Native villages occupying the land. Respondents then invoke case law dealing with the termination of tribal status, *see* Resp. Br. 38-39, and claim that the "question presented by the State * * * is whether ANCSA was a termination act." *Id.* 40 n.37. Tribal status and Indian country, however, are distinct concepts. *See* Pet. Br. 12 n.8; *see infra* at 16-17. The question in this case is whether ANCSA land is Indian country; the State has never argued that ANCSA terminated the tribal status of the land's inhabitants.

ately followed by a footnote acknowledging the 1993 DOI opinion concluding that ANCSA precludes recognition of settlement land—such as the Venetie tract—as Indian country. *Id.* at 9251 n.1. This important distinction between tribal status and the existence of Indian country—which was also recognized in the first Federal Register designation of federally recognized tribes in Alaska, *see* 58 Fed. Reg. 54364, 54366 n.1 (Oct. 21, 1993)—is simply ignored by respondents in crafting their argument that Indian country status flows inexorably from tribal recognition.

Respondents' reliance on tribal status as the touchstone of the dependent Indian community test is also doctrinally flawed. Under this approach, the heretofore circumscribed dependent Indian community category of Section 1151(b) would swallow the entire Indian country statute —not to mention tens of millions of acres of land in Alaska and the contiguous United States not designated as Indian country by Congress—because, under this test, practically *any* land occupied by a federally recognized tribe would be Indian country. This is an astonishing new conception of the dependent Indian community test. ANCSA, however, forces respondents to advance it because, as both the District Court and the Ninth Circuit found, and as respondents themselves acknowledge (Br. 13), ANCSA unmistakably relinquished federal superintendence and control over the land conveyed as part of the settlement, including Venetie.[11]

In any event, this Court's Indian country precedents plainly contemplate superintendence over the land, not

[11] *See* Pet. App. 29a ("Today, Venetie owns its land in fee simple, and the federal government exercises few controls (if any) over Venetie's territory") (Ninth Circuit); *id.* 70a ("The federal government no longer has any right or responsibility for the active supervision of Alaska Natives with respect to the lands which they occupied after extinguishment of aboriginal title.") (District Court); DOI Op., p. 121 ("The present relationship between ANCSA-conveyed Native landholdings and the Federal government * * * cannot be characterized as a guardianship or as related to a trust.").

simply the political entity inhabiting it. The Court has consistently stated that "the principal test" for determining whether land is Indian country is "whether *the land in question* 'had been validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *United States* v. *John*, 437 U.S. 634, 649 (1978) (citing *United States* v. *Pelican*, 232 U.S. at 449; *McGowan*, 302 U.S. at 539) (emphasis added). Reading the superintendence prong of this test to modify "Indians" rather than "the land in question"—as respondents do—effectively eliminates the superintendence requirement altogether, since, under this approach, superintendence will always be present whenever the land is occupied by a federally recognized tribe. This Court, however, has always looked separately to whether Congress retained federal control over the *land* in question.

Thus, for example, in *Pelican* the Court held that the lands in question—certain Indian allotments—were Indian country *not* because the allotments were occupied by Indians, but because "the Government retain[ed] control" over these lands. 232 U.S. at 449. As the Court emphasized, the allotment statute left "no room for doubt as to the intent of Congress with respect to the maintenance of the Federal jurisdiction *over the allotted lands.*" *Id.* at 451 (emphasis added). Likewise, in *McGowan* the Court—in concluding that the requisite superintendence was present—emphasized that "[t]he Government retains title to the lands which it permits the Indians to occupy" and "the authority to enact regulations and protective laws *respecting this territory*." 302 U.S. at 539 (emphasis added). *John* is to the same effect. *See* 437 U.S. at 649 (emphasizing that "[t]he Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government").[12]

[12] The focus on Congress' intent to assume superintendence over the land is key because, as discussed, Indian country is presumptively beyond the reach of state law, meaning that the federal government must oversee regulation not only of the people who occupy Indian country, but the land itself.

Respondents' emphasis on the political status of the land's occupants also suffers from an historical anachronism. Throughout most of Alaska's history, the status of Alaska Native villages as "Indian tribes" has—because of the unique history of these communities—been unsettled. *See* DOI Op., p. 48.[13] In 1993 the federal government sought to resolve this issue and, over the objection of many, recognized these villages as tribes—with, as noted, the important caveat that such recognition did not imply Indian country status. 58 Fed. Reg. 45364. Nevertheless, the fact that in 1971 Alaska Native villages had *not* been recognized as tribes provides still another reason to reject respondents' theory of why ANCSA land is Indian country: the basic predicate for that theory was not even established when ANCSA was passed. *See United States* v. *Wise*, 370 U.S. 405, 411 (1962) ("Statutes are construed by the courts with reference to the circumstances existing at the time of passage").

Viewed from the proper perspective, both the clear intent of Congress in enacting ANCSA and the record before this Court support only one conclusion: the requisite superintendence is lacking over Venetie and the tens of millions of additional acres of land conveyed as part of the settlement. *See* Pet. Br. 39-45. The absence of federal control over the land is itself a sufficient basis to reach this conclusion, and to deny respondents' Indian country claim. *See* Pet. Br. 40-41.[14]

3. When it comes to the other principal requirement of this Court's Indian country test—the federal set aside—

[13] Respondents' own authorities recognize as much. *See, e.g.*, Deborah Niedermeyer, *"The True Interests of a White Population": The Alaska Indian Country Decisions of Judge Matthew P. Deady*, 21 Int'l L. & Pol. 195, 204 n.54 (1988).

[14] The federal government has acknowledged its lack of control. *See* DOI Op., p. 121 ("Because [ANCSA landholders] have complete freedom to control their lands, those lands and the Natives located on them *cannot* be regarded as dependent Indian communities as that term has been understood.") (emphasis added).

respondents rely on the land's *former* status, suggesting that the requisite set aside is met because the Venetie tract was originally "set apart from the public domain under the rule of *Bates* v. *Clark*," and used to be a reserve. Resp. Br. 33; *see* Opp. Cert. 23-24. Respondents then assert that "ANCSA continued" the pre-existing set aside simply because it treated Venetie as "a reasonably distinct location." Resp. Br. 33 (internal quotation marks omitted). It is difficult to imagine a more ill-conceived test. In ANCSA, Congress expressly eliminated any set aside that may have existed by both extinguishing the land's aboriginal title and revoking its reservation status. *See supra* at 6-7.

The fact that ANCSA corporations established by villages occupying extinguished reserves were given the *option* of acquiring title to former reservation land as part of the settlement does not establish the requisite set aside. As we explained in our opening brief (p. 34), in every previous case in which this Court has found a set aside, Congress had explicitly designated the land as either "Indian country," a "reservation" or its equivalent, or "trust land," thereby devoting the land to Indian use and occupancy, until *Congress* said otherwise. By contrast, in ANCSA, Congress extinguished the pre-existing federal controls over the land (including reservation status), made the land freely alienable, then conveyed it to state-chartered for-profit corporations to do with as they see fit. *See* Pet. Br. 34-35.

The Village received title to the Venetie tract by way of a fee transfer from the ANCSA corporations which had received the land under the settlement. Pet. App. 4a. It is undisputed that, if it wished to do so, the Village could turn around and convey the land in whole or part to another entity—Native or not—as many other ANCSA landholders have done in the wake of the settlement. *See* Pet. Br. 9-10, 37 & n.27; Koniag Br. 10-11, 25; AFN Br. 24 n.31; J.A. 155 ("Congress has consented in the

Settlement Act to unrestricted Native alienation of ANCSA patented lands") (DOI letter). The free alienability of the Venetie tract is perhaps the clearest possible proof of the *absence* of the requisite set aside, since it absolutely belies any notion that Congress sought to ensure "permanent protection of [the Village's] land." Resp. Br. 41.

In ANCSA, moreover, Congress not only did not devote the land to any permanent use, it did not convey it to "Indians as such." *See* Pet. Br. 35-36; DOI Op., p. 82. Contrary to the suggestion of respondents (Br. 45-49), Congress went out of its way to make certain that the land was conveyed *not* to Indians or tribal entities, but rather to racially-neutral, state-chartered, for-profit business corporations that—quite unlike tribes occupying Indian country—were made subject to state law, even state taxes. *See* Pet. Br. 34-36. Thus, as the Department of the Interior concluded, "conveyance of former Venetie Reserve lands to the ANCSA entities in fee was * * * *not* to tribes." J.A. 152 (DOI letter) (emphasis added). *See also* Shee Atika Br. 6-16 (discussing the significant differences between ANCSA corporations and tribal entities).[15]

This was, to be sure, a marked departure from prior Indian legislation, *see* Pet. 5 n.5—made possible by the unique history of Alaska and its Natives—and one from

[15] Respondents and their amici point to Section 1602(j) of ANCSA, which states that Village corporations were organized under state law to "hold, invest, manage and/or distribute" the land "for and on behalf of a Native village * * *." *See* Resp. Br. 20, 36, 45. This provision, however, cannot be understood without the omitted text in place of the ellipses, which continues "*in accordance with the terms of this chapter.*" 43 U.S.C. § 1602(j) (emphasis added). Those terms, as discussed, made clear that Congress sought to avoid the creation of "racially defined institutions," *id.* § 1601(b), and subjected ANCSA corporations to state law, which, among other things, requires that corporate assets be managed for the benefit of shareholders, regardless of their race or ethnic origin. *See* Shee Atika Br. 4 ("In no sense does the ANCSA corporation hold its ANCSA assets 'for' the local tribe or the tribe's members."); *id.* 16-18 (same).

which Venetie was *not* excepted.[16] In fact, the Venetie tract was initially conveyed—just like the tens of millions of other acres of land subject to the settlement—to state-chartered ANCSA corporations, which, in the case of Venetie, held it for *six years* before they unilaterally elected to convey the land to the Village. *See* Pet. Br. 11.[17] This conveyance was hardly a federal set aside; it was a "voluntary act," "not joined in nor approved by the federal government." Pet. App. 75a. The federal government agrees. *See* DOI Op., pp. 122-123. Only Congress can create Indian country. Neither ANCSA nor this Court's Indian country precedents "permit Native villages to create Indian country in Alaska by unilateral action." DOI Op., p. 132. That, of course, is precisely what the Village of Venetie has attempted to do. *See* Pet. Br. 39.[18]

[16] Respondents once again seek to distinguish Venetie from other ANCSA land. But the only pertinent difference with Venetie (and the other revoked reserves) is that—in light of Section 1618(a)—Congress' intent that the land *not* be Indian country is even more clear. *See* Pet. Br. 33; Reply to Opp. 3-6. Any other distinctions are without a difference. Indeed, respondents' own counsel declared that the Ninth Circuit "holding is not unique to Venetie and, therefore, will apply to virtually all other Native villages." Native American Rights Fund, *Yes, There is Indian Country in Alaska*, 22 NARF Legal Rev. 1, 2 (Winter/Spring 1997). And, of course, respondents' central argument—that Venetie is Indian country because it is "homeland"—is not limited to this case. As respondents themselves point out, "[l]ike Venetie, many [villages] remain in possession of their ancestral lands." Resp. Br. 7-8. Congress was well aware of that when it passed ANCSA; Native claims of aboriginal ownership were one of the principal factors that prompted Congress to act. The ANCSA Congress would be shocked to learn, however, that—having gone to such extraordinary lengths to extinguish aboriginal title and relinquish federal control over these lands—Native villages such as Venetie could assert that they occupy Indian country.

[17] Respondents' statement (Br. 34) (internal quotation marks omitted; bracketed material in original) that "Congress granted to [Venetie] title" to the land is, accordingly, flat wrong.

[18] In arguing that the Venetie tract "continue[s]" to be set aside under ANCSA, respondents also rely upon various subsequently enacted statutes in which Congress has specifically referenced

IV. DESIGNATING SETTLEMENT LANDS AS INDIAN COUNTRY WOULD OVERTURN THE LONG-STANDING JURISDICTIONAL REGIME IN ALASKA.

1. There is nothing anomalous about the result called for by ANCSA. While they often coincide—at least, historically speaking, in the lower 48 States—tribal status and Indian country are distinct concepts. Whether or not they occupy Indian country, Indian tribes retain inherent authority to "control internal relations." *Montana* v. *United States*, 450 U.S. 544, 564 (1981); *see* Pet. App. 80a-81a. Accordingly, the District Court below held in a related case that, as a tribe, the Native Village of Venetie may—without regard to whether it occupies Indian country—regulate member adoptions. *See id.* 126a. The State does not challenge that ruling; it challenges the Village's assertion of the authority to govern—to the presumptive exclusion of state law—the 1.8 million-acre Venetie tract and the activities of non-members on it. The exercise of that authority requires an additional determination that the tribe occupies Indian country. *See* Pet. Br. 18; DOI Op., pp. 108-110. As noted, the Department of the Interior itself made that clear when it recognized the Village of Venetie and 225 other Alaska Native villages as Indian tribes. *See supra* at 9-10.

Consistent with this framework, this Court has recognized that Congress may revoke a reservation—and, with it, the land's Indian country status—without terminating the federal government's trust relationship with the tribe occupying the land, leaving intact the tribe's authority over internal matters. *See DeCoteau* v. *District County*

Alaska Native villages or ANCSA lands. *See* Resp. Br. 34-36. What is significant about the cited statutes is not that Alaska Native villages or ANCSA lands are covered, but rather *how* they are covered—by special mention that would be wholly unnecessary if Congress thought the land was Indian country under Section 1151(b). Respondents' other efforts to invoke subsequent legislative history fail for the reasons stated in our opening brief. *See* Pet. Br. 45 n.33.

Court, 420 U.S. at 442-443.[19] In addition, the court has held that the authority of the States to govern Indian lands and activities turns on the Indian country determination, not simply on whether the subject of regulation is a federally recognized Indian tribe. *See, e.g., Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 125 (1993) (test for whether "tribal members" are outside normal state jurisdiction is "whether the land is Indian country").[20]

Above all, this Court has made clear that Congress has plenary authority to establish (or restrict) the sovereignty of Indian tribes, whether it be over members, non-members, or land. *See* Pet. Br. 18-19; *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 476 U.S. 877, 884-885 (1986). That principle controls here. As respondents' own authorities attest, one of the overriding purposes of ANCSA was to sever ANCSA land from Native government. *See* David S. Case, *Alaska Natives and American Laws* 447 (1984 ed.) ("unlike previous and subsequent aboriginal settlements, [ANCSA] severed Native land ownership from Native government") (footnotes omitted).

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[19] Similarly, there is no requirement that an Indian group occupy "Indian country" to receive federal recognition as a sovereign tribe in the first place. *See* 25 C.F.R. § 83.7 (1997).

[20] *See also Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (same); *Bryan* v. *Itasca County, Minn.*, 426 U.S. 373, 376-377 n.2 (1976) ("[s]tate laws generally are not applicable to tribal Indians on an Indian reservation," but generally are applicable to "tribal Indians who have left or never inhabited federally established reservations") (internal quotation marks omitted); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973) ("Absent express federal law to the contrary, Indians *going beyond reservation boundaries* have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.") (emphasis added); *A-1 Contractors* v. *Strate*, 76 F.3d 930, 939 (8th Cir. 1996) (The Supreme Court's decision in *"Montana* [v. *United States, supra*] implicitly recognizes that without the geographic connection to Indian country, the tribes would have no plausible grounds for asserting jurisdiction over the non-Indian parties."), *aff'd*, 117 S. Ct. 1404 (1997).

As Judge Fernandez put it, "[i]f ANCSA meant anything at all, it meant that the tribes, as such, would no longer have control or sovereign power over the land. They would only have sovereignty over their own members." Pet. App. 35a. In its 133-page opinion on the precise question presented here, the Department of the Interior reached the same conclusion. *See* DOI Op., pp. 107-108, 131-132.[21]

2. In effect, that is the way it has always been in Alaska. As we explained in our opening brief (pp. 5-7), in Alaska—quite unlike the situation in the lower 48 States—Native villages traditionally have been subject to the full gamut of state laws and regulations. While respondents attempt to create a different impression, the authorities upon which they rely confirm this important jurisdictional fact.[22] This Court's own decisions do so,

[21] While respondents urge the Court to ignore this opinion (Br. 29 n.25), it "has *not* been withdrawn or modified" by the agency, 60 Fed. Reg. at 9251 n.1 (emphasis added), and plainly is entitled to weight in construing ANCSA. The opinion's exhaustive analysis and even-handed treatment of the precise question presented here alone compel that conclusion. But, approved by the Acting Secretary (DOI Op., p. 133), the opinion represents the considered view of the agency that not only is charged with overseeing Indian affairs (25 U.S.C. § 2), but with administering ANCSA (43 U.S.C. § 1624), a statute it helped to draft. *See Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) ("principles of [agency] deference have particular force" when the agency "has long-standing expertise in the area," and the agency "was intimately involved in the drafting and consideration of the statute by Congress"); Pet. 22. Thus, in analogous circumstances, courts have held that the Department's view is entitled to "considerable deference." *Aleknagik Natives Ltd.* v. *United States*, 806 F.2d 924, 926 (9th Cir. 1986) (Kennedy, J.) (deferring to DOI interpretation of ANCSA in non-published memorandum approved by Acting Secretary).

[22] *See, e.g.*, Sidney L. Harring, *Crow Dog's Case* 220 & n.40 (1995) (Alaska Natives "were made subject to all of the same laws that governed whites in the Territory of Alaska," including "a full range of white laws governing all aspects of social life"); Case, *supra*, at 13-14 ("It was generally presumed that the territory of Alaska had the same jurisdiction over Alaska Natives as over its

too. *See Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 51 (1962). If ANCSA lands were Indian country, it would turn this long-standing jurisdictional regime on its head, presumptively ousting state laws and jurisdiction from hundreds of communities and 97 percent of the privately-held land in the State. *See* Pet. Br. 48-49.

In light of the unique history of Alaska and its Natives, it was also established long before Congress enacted ANCSA that there was no Indian country in Alaska. *See* Pet. Br. 6-7; Harring, *supra*, at 214-220, 233-236 (discussing cases in which courts repeatedly "held that Alaska was not Indian country").[23] Respondents and their amici would like to revisit the nearly unbroken line of nineteenth century precedents holding as much, *see* Resp. Br. 9 & n.8, but their efforts are largely beside the point. These rulings indisputably formed the legal and historical backdrop against which the law governing Alaska Natives developed and, more to the point, Congress legislated when it passed ANCSA. As respondents' own authorities acknowledge, *see* Niedermeyer, *supra*, at 204, this backdrop provides still more support for the conclusion that ANCSA lands are not Indian country.

other citizens."). These authorities also refute the astonishingly revisionist assertion that, "[s]ince the Territory's purchase, Alaska Native tribes have been under the same legal regime applicable to all other Native American tribes." Resp. Br. 8. *See* Harring, *supra*, at 207 ("The legal history of Indian-white relations in Alaska is *substantially unrelated* to parallel developments in the rest of the United States.") (emphasis added).

[23] Respondents take issue with the statement that "'[v]ery few [reserves] were ever created'" in Alaska, Pet. Br. 4 (quoting *Egan*, 369 U.S. at 51), suggesting that "over 126 reservations" existed. Resp. Br. 11. In fact, "[p]rior to ANCSA there were only two statutory reserves and six IRA reserves" in Alaska. Case, *supra*, at 109. These were the only types of reservations in Alaska that "nearly approximated the true Indian reservations of the lower forty-eight states," *id.* at 108; the others apparently referred to by respondents consisted of "reindeer reserves," "school reserves" ranging in size from 3 to 40 acres, and miscellaneous community development "reserves," which did not begin to fit the typical mold. *Id.* at 118-119 n.43.

CONCLUSION

To sustain the Ninth Circuit ruling, respondents urge this Court to adopt an entirely new conception of the dependent Indian community category of Indian country. The distinguishing characteristic of this new approach is that it is largely divorced from any consideration of the intent of Congress or the Executive's interpretation of that intent. Respondents urge this Court to create and declare Indian country not only where Congress and the Executive have not, but where Congress and the Executive have unambiguously rejected such a designation. This Court should instead give effect to the clearly expressed intent of Congress and hold that ANCSA land is not Indian country.

For the foregoing reasons, and those in petitioner's opening brief, the Court should reverse the judgment of the Ninth Circuit below.

Respectfully submitted,

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